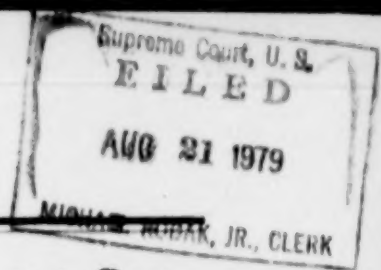


No. 78-1852



In the Supreme Court of the United States

OCTOBER TERM, 1978

**CHROMALLOY AMERICAN CORPORATION,
FEDERAL MALLEABLE DIVISION, PETITIONER**

v.

RAY MARSHALL, SECRETARY OF LABOR

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 589 F. 2d 1335. The opinion of the district court (Pet. App. A21-A27) is reported at 433 F. Supp. 330.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1979. A petition for rehearing was denied on March 14, 1979 (Pet. App. A19; as corrected, Pet. App. A20). The petition for a writ of certiorari was filed on June 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether federal district courts have jurisdiction to issue administrative search warrants authorizing Occupational Safety and Health Administration (OSHA) workplace inspections.

2. Whether, assuming the district courts have jurisdiction to issue administrative search warrants, such warrants may be issued by United States magistrates.

3. Whether the application for the administrative search warrant in this case contained facts sufficient to support issuance of the warrant.

STATEMENT

Petitioner is a corporation that operates a foundry in West Allis, Wisconsin (Pet. App. A30). On April 19, 1977, as part of a nation-wide foundry inspection program designed to assure compliance with the Occupational Safety and Health Act of 1970, two OSHA inspectors appeared at petitioner's premises to conduct a compliance investigation. The inspectors were denied entry by company officials (*id.* at A32).

The next day the OSHA inspectors applied to a United States magistrate in the Eastern District of Wisconsin for an administrative warrant to inspect petitioner's foundry. The warrant application described the purpose of the inspection, stating that it was part of a "National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illness * * * in the * * * foundry industry" (Pet. App. A30-A32).¹ The

¹The Secretary is authorized to conduct administrative inspections by Section 8(a) of the Act, 29 U.S.C. 657(a), which provides:

In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

magistrate issued the warrant, finding that "reasonable legislative and administrative standards [had] been prescribed" for the inspection and that, in light of "the high incidence of occupational injuries and illnesses * * * in the * * * foundry industry" attested to in the warrant application, probable cause to conduct the inspection had been established (*id.* at A28; see *id.* at A32).

When the compliance officers returned to petitioner's foundry to execute the warrant, they were again denied entry by a company official, who stated that he "could not permit the officers to enter * * * [because] the warrant was not for a specific area of the plant" (Pet. App. A22).²

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

²The warrant authorized the Secretary (Pet. App. A28-A29)

to enter the above described premises during regular working hours or at other reasonable times, and to inspect and investigate in a reasonable manner and to a reasonable extent (including but not limited to the taking of photographs and samples, and the questioning privately any owner, operator, agent, employer or employee of the establishment), the workplace or environment where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether employer is furnished to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injuries to its employees, and whether this employer is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act.

The Secretary thereafter moved for an order holding petitioner in civil contempt for refusing to allow the inspectors to execute the warrant. The district court granted the motion. The court concluded that the warrant was "sufficiently particular as to the premises to be searched" (Pet. App. A26) and was based on an adequate demonstration of probable cause under the standard of *Camara v. Municipal Court*, 387 U.S. 523, 536-539 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967). The court noted that specific employee complaints or injuries or other particularized causes are not required in order to obtain an administrative warrant to conduct compliance inspections in such a "potentially hazardous" industrial setting (Pet. App. A25-A26). It therefore entered an order holding petitioner in civil contempt and directing petitioner to permit compliance inspections to be conducted "forthwith during regular working hours or at other reasonable times, and * * * in a reasonable manner and to a reasonable extent" (*id.* at A27).³

The court of appeals affirmed (Pet. App. A1-A17). The court held that the district courts have jurisdiction to issue administrative search warrants to enforce OSHA requirements (*id.* at A17)⁴ and ruled that such warrants may be issued by magistrates acting under the Federal

³The district court denied the company's application for a stay of its order pending appeal, but the court of appeals subsequently granted a stay.

⁴On the question of jurisdiction, the court stated (Pet. App. A17) that it was relying on the dissenting opinion of Judge Tuttle in *Marshall v. Gibson's Products, Inc.*, 584 F. 2d 668 (5th Cir. 1978). As we show below (pages 7-8, *infra*), the decision of the majority in *Gibson's Products* does not conflict with the decision in this case.

Magistrates Act, 28 U.S.C. 636 (Pet. App. A9).⁵ The court further held that the warrant application in this case contained facts sufficient to support issuance of the administrative warrant (*id.* at A11-A15). The court observed that "the magistrate was apprised of a 'National-Local plan' designed to reduce the 'high incidence' of occupational injuries in the foundry industry," that he "was entitled to assume * * * a direct connection between injuries and violative hazards," and that he "could rely on the known expertise of the Secretary in gathering the statistics in the area of occupational injuries and his ability to form a reasoned opinion that this rate indicated a 'high incidence' of injuries in the foundry industry" (*id.* at A14-A15).⁶

ARGUMENT

1. Petitioner contends (Pet. 7-10) that the federal district courts lack jurisdiction to issue administrative search warrants to aid enforcement of the Occupational Safety and Health Act. This contention was properly rejected by the court of appeals.

28 U.S.C. 1337 grants jurisdiction to the district courts over "any civil action or proceeding arising under any Act of Congress regulating commerce * * *." The Occupational Safety and Health Act plainly is a regulation of commerce. And an application for an administrative warrant to perform a compliance inspection pursuant to Section 8(a) of the Act, 29 U.S.C. 657(a), is a proceeding

⁵Federal magistrates are authorized to exercise "all powers and duties conferred or imposed upon United States commissioners by law," 28 U.S.C. 636(a)(1), and "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. 636(b)(3).

⁶The court also rejected petitioner's claim that the warrant was overbroad (Pet. App. A16-A17), noting that the warrant was restricted to the subject matter regulated by the Act (*id.* at A16).

arising under the Act because it seeks a remedy granted by, or properly inferable from, the Act. See, e.g., *Gully v. First National Bank*, 299 U.S. 109, 112 (1936); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916).⁷

Moreover, as the court of appeals stated in *United States v. Illinois Bell Telephone Co.*, 531 F. 2d 809, 812-814 (7th Cir. 1976), the district courts "inherently have power" to fashion and issue warrants or equivalent process in response to governmental requests "which if unresponded to could seriously hamper the implementa-

⁷Pursuant to his authority to adopt regulations, the Secretary has provided for the obtaining of a warrant as a means to implement the inspection provision of the Act (see 29 C.F.R. 1903.4, amended by 43 Fed. Reg. 59838-59839 (Dec. 22, 1978)). The warrant proceeding is therefore based on the regulations as well as the statute. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 n.15, 325 n.23 (1978).

Moreover, 28 U.S.C. 1345 grants jurisdiction to the district court over "civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." The Attorney General may bring suit under this provision to enforce the requirements of federal laws. *Sanitary District v. United States*, 266 U.S. 405, 425-426 (1925); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888); *United States v. Shafer*, 132 F. Supp. 659 (D. Md. 1955), aff'd, 229 F. 2d 124 (4th Cir.), cert. denied, 351 U.S. 931 (1956). The Solicitor of Labor is authorized by 29 U.S.C. 663 to appear for the Secretary, under the direction and supervision of the Attorney General, "in any civil litigation" brought under the Occupational Safety and Health Act of 1970. The Attorney General has implemented this authority by a formal memorandum of understanding which delegates litigating responsibility under OSHA to the Secretary. The agency may thus act in the Attorney General's stead to initiate an action in the district court to discharge the agency's inspection duties under the Act.

tion of the original legislation."⁸ See, e.g., *United States v. Republic Steel Corp.*, 362 U.S. 482, 491-492 (1960); *United States v. City of Chicago*, 549 F. 2d 415, 440 (7th Cir.), cert. denied, 434 U.S. 875 (1977). Federal courts may issue affirmative and injunctive orders "to aid administrative agencies in carrying out their congressionally authorized powers and duties, despite the absence of any express grant of district court jurisdiction under the agencies' respective enabling acts." *NLRB v. British Auto Parts, Inc.*, 266 F. Supp. 368, 374 (C.D. Cal. 1967). This power is presumed available in the absence of a statute expressly providing to the contrary. *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-398 (1946). Accordingly, in *Marshall v. Barlow's, Inc.*, supra, 436 U.S. at 316-320, this Court properly assumed that the Secretary may secure a warrant to enforce the inspection requirements of the Act. *Id.* at 320.

The decision in this case is not in conflict with *Marshall v. Gibson's Products, Inc.*, 584 F. 2d 668 (5th Cir. 1978), as petitioner contends (Pet. 7). In that case, the Fifth Circuit held that federal district courts lack jurisdiction to enter an injunctive order compelling an employer to submit to a warrantless OSHA inspection. 584 F. 2d at 675. While much of the court's reasoning in *Gibson's Products* is inconsistent with the position we take here, the court nonetheless expressly declined to decide whether district courts also lack jurisdiction to issue an administrative warrant to enforce the Act. *Id.* at 673 n.6, 677-678 n.16. The Fifth Circuit has since emphasized that

⁸In that case the court approved the "commonsense approach used by the district court in issuing [the equivalent of a search warrant] based on probable cause and following a procedure designed to comply with Fourth Amendment considerations in authorizing the use by the government of [a] pen register * * *." 531 F. 2d at 812-813. This reasoning was cited with approval in *United States v. New York Telephone Co.*, 434 U.S. 159, 168 n.14 (1977).

its decision in *Gibson's Products* did not reach the question whether district courts have jurisdiction to consider OSHA warrant applications. *Marshall v. Shellcast Corp.*, 592 F. 2d 1369, 1370-1371 & n.3 (1979). The court also noted that numerous courts have concluded that such jurisdiction does exist in the district courts, whereas no court has held to the contrary. *Ibid.* There is thus no conflict among the circuits on the question presented in this case.

2. Petitioner contends (Pet. 13-14) that the court of appeals erred in concluding that United States magistrates may issue search warrants for administrative inspections. Petitioner suggests that such authority may be exercised by a magistrate only if the authority has been expressly delegated to the magistrate by the rules of the local district court (Pet. 14).⁹

Every court that has considered this question, however, has concluded that magistrates are empowered by the Federal Magistrates Act to issue administrative inspection warrants either as a power or duty formerly exercised by United States commissioners (28 U.S.C. 636(a)(1)), as a duty not inconsistent with the Constitution and laws of the United States (28 U.S.C. 636(b)(3)), or as an inherent power of magistrates under the Act. See, e.g., *In re Worksite Inspection of Quality Products, Inc.*, 592 F. 2d 611, 613 & n.2 (1st Cir. 1979); *Lockport Non Ferrous*

⁹The 1968 version of the Federal Magistrates Act required that magistrates' duties be assigned by rules established by "a majority of all the judges of such district court" (82 Stat. 1113). The court of appeals correctly pointed out (Pet. App. A9 n.5) that "[t]he 1976 amendment [to the Magistrates Act] eliminated any requirement that such duties be assigned by rule * * *."

We note, moreover, that the United States District Court for the Eastern District of Wisconsin has amended its local rules expressly to authorize its magistrates to issue administrative inspection warrants (Pet. App. A9 n.5).

Casting, Inc. v. Marshall, 441 F. Supp. 333, 336 (W.D. N.Y. 1977); *Empire Steel Mfg. Co. v. Marshall*, 437 F. Supp. 873, 881-882; (D. Mont. 1977). See also *Pelton Casteel, Inc. v. Marshall*, 588 F. 2d 1182, 1186 (7th Cir. 1978). This conclusion is correct, for the reasons stated by the court of appeals (Pet. App. A9-A11).

3. Petitioner argues (Pet. 11-13) that the affidavit filed in support of the administrative warrant did not contain facts sufficient to establish probable cause to conduct the search. As this Court held in *Marshall v. Barlow's, Inc.*, *supra*, however, probable cause for the issuance of an administrative search warrant need not be based "on specific evidence of an existing violation * * *." 436 U.S. at 320. It may be based on a "showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act * * *." *Id.* at 321. The court of appeals correctly concluded (Pet. App. A11-A13) that the affidavit filed in support of the warrant in this case satisfied this standard.

The affidavit stated that petitioner's foundry had been chosen for inspection pursuant to "a National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illnesses found in the metalworking and foundry industry * * *" (Pet. App. A11). It thus detailed the particular need for safety inspections in this occupational field and informed the magistrate that petitioner's establishment had been selected under a national administrative plan for enforcement of the Act.

Petitioner argues that this affidavit is insufficient because it does not "describe the administrative plan" and "identify [the] neutral criteria" under which the search is

warranted (Pet. 12).¹⁰ But as the court of appeals observed (Pet. App. A13-A14), the affidavit explains that the plan had been drawn particularly for metalworking and foundry establishments, was designed with regard to the high incidence of occupational injuries in those industries, and was a national plan for local enforcement of inspection requirements. Thus, as the court concluded, the affidavit was sufficient to assure that the inspection was conducted pursuant to a plan derived from "neutral sources" (*Marshall v. Barlow's, Inc.*, *supra*, 436 U.S. at 321) and was not "the result of the 'unbridled discretion' of a field agent * * *" (Pet. App. A15).

Petitioner's essentially factual challenge to the sufficiency of the warrant affidavit was properly rejected by the court of appeals. Further review of the issue by this Court is therefore unwarranted.

¹⁰As petitioner notes (Pet. 12), *Barlow's* suggests that an affidavit for an administrative warrant should contain more than a bare allegation that the inspection was "part of an inspection program designed to assure compliance with the Act." 436 U.S. at 323 n.20. The court of appeals properly observed that the affidavit in this case was not so limited, but "supplied additional pertinent information" (Pet. App. A12).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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